quiries with every purchase to ascertain whether or not the food he buys is fit to be eaten. In a matter in which the public is so vitally interested, it should not be possible for scheming and fraudulent dealers to shelter themselves behind the plea of ignorance. The law imposes upon them the duty of knowing what they are selling and they should not be exculpated merely because they violate this duty.

The courts of Texas, contrary to the great weight of authority, still cling to the view that it is necessary to prove intent even where the statute does not require it. *Teaque v. State,* 25 Tex. App. 577. The question has been directly presented but once, however, and it seems probable that the next time it arises the Texas courts will adopt the prevailing view.

WAIVER OF CONDITION PRECEDENT.

The Court of Appeals of New York on November 10, 1908, rendered a most interesting decision in the case of *Clark v. West.* This was an action to recover on a written agreement entered into between two parties, by which the plaintiff was to write law books for the defendant, receiving two dollars per page during the progress of the work, and, if he abstained from the use of intoxicating liquors during the existence of the contract, he should, every six months after the publication of a book, receive a percentage of the net receipt of the sales, amounting, with what he had already received, to six dollars per page. The plaintiff completed the work to the satisfaction of the defendant after having complied with all the terms of the contract, with the exception of that of total abstinence, which the defendant knew had been violated, but nevertheless continued to exact full performance of all the other conditions, and repeatedly avowed, and represented to the plaintiff, that he was entitled to and would receive the royalty payment. The court held the stipulation with respect to the plaintiff's total abstinence was not of the consideration, or the subject matter of the contract, but an incident to the method of its performance, and might, therefore, be waived without any formal agreement to that effect based on a new consideration.

This case, rather unusual in its nature, seems undoubtedly to be properly decided, for as the court says: "The subject matter of the contract was the writing of the books," and the stipulation, in regard to the plaintiff receiving a greater sum in the event of

his total abstinence during the continuation of the contract, was inserted not to make it "a contract to write books in order that the plaintiff should keep sober," but on the contrary, so as to insure his keeping sober so he could write more satisfactory books. Thus, it is evident that the stipulation was not the consideration of the contract, but merely one of the conditions which should be included with the many others so as to insure a work, which would be a normal production of the plaintiff. It was a condition precedent upon which the defendant could have insisted, or, for the breach of which a loss or forfeiture could have been enforced upon the plaintiff.

The courts, both in this country and in England, have generally held, that in the case of conditions precedent, if the promisor attaches any such conditions to his promise, he cannot be bound unless those conditions have been absolutely and literally fulfilled, Thus, in the case of *Bruce v. Snow,* 20 N. H. 484, in which the plaintiff gave a note to insure the presence of an accused person at the office of the defendant from nine to ten on a certain day, on the condition that if the accused should appear the note would be void. On the designated day, the accused did not appear till nine-forty and the court held, that as the accused was forty minutes late, the condition was not fulfilled and the note was still in force. In an English case, *Beatson v. Schank,* 3 East 233, the court held that a party who bound himself to keep a certain number of men on his vessel, was compelled to provide against the exigency of any of them dying, by taking an extra number on board. Similar decisions have been rendered in the cases of *Oakley v. Morton,* 11 N. Y. 25, and *Dorsley v. Wood,* 6 T. R. 710.

But, general as this proposition is, there exists in some states a peculiar doctrine, by which, if the plaintiff has attempted to perform his contract with the defendant in good faith, and has substantially performed it, he may recover the contract price from the defendant less the amount necessary to compensate the defendant for damages caused by his, the plaintiff's, failure to perform the contract exactly. Probably one of the most interesting cases in this connection is the case of *Nolan v. Whitney,* 88 N. Y. 648, in which the plaintiff's testator had entered into a contract with the defendant company to do the mason work in the erection of two buildings. The work was to be done under the direction and to the satisfaction of the architect, who was to give the contractor his certificate testifying to his satisfaction before any payment

could be made. The payments were to be made in installments and as the last one had not been paid the plaintiff brought this action to recover it. The defendant claimed the work had been improperly done and that the contractor had not obtained the architect's certificate. The court held, however, that, as the evidence showed the contractor had substantially performed his agreement, and had acted in good faith, the architect was bound to give him his certificate, and thus he could recover the contract price less due compensation, for the loss incurred by not having performed the work according to details. This principle is also exemplified in the cases of *Shepherd v. Mills,* 173 Ill. 223, and *Keeler v. Herr,* 157 Ill. 57.

Although this doctrine, recognizing substantial compliance as being sufficient, is generally limited to building contract cases, where the owner of land has no opportunity of rejecting a building which does not conform to specifications, nevertheless, it is difficult to see how it can be supported on the contractual or quasi-contractual theory. In viewing it from the contractual side, it seems evident the plaintiff would have no right to demand the contract price, because he has not performed the contract; while if the defendant's obligation is quasi-contractual, it must be measured by the actual value of the work which the plaintiff has performed and not by the contract price less the damage caused by non-performance. The better rule seems to be that if any obligation exists, it is quasi-contractual and limited to the value of the benefits received. *Harriman on Contracts,* 2nd. Ed., Sect. 339.

Conditions precedent may, however, be waived, without any consideration, by the act of the party for whom they are imposed, as in this case of *Clark v. West.* Waiver has been defined to be "the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage upon which the party waiving it might at his option have demanded or insisted." *Herman on Estoppel and Res Adjudicata,* Vol. II, p. 954. It usually arises when the substantial part of a contract has been performed, and the other party has voluntarily accepted and received the benefit of the past performance, knowing that the contract has not been fully carried out. This acceptance will amount to a waiver of the party's right to compel full performance as a condition of his liability. The case of *Wiley v. The Inhabitants of Athol,* 150 Mass. 426, serves

as a good illustration of this principle. In that case, the plaintiff company entered into a contract guaranteeing to furnish the defendant town a specified supply of water for fire service, at a certain rental per hydrant, for a term of years. At no time did the plaintiff furnish the guaranteed amount, but the defendant, having knowledge of this, nevertheless continued to use it for a number of years and then refused to pay their rent, alleging the supply was not in conformity with the contract. In an action for arrears by the plaintiff, the court held that as the defendant had voluntarily accepted and received the benefit of part performance, knowing the contract was not being fully performed, they were precluded from relying on the performance of the residue as a condition precedent to their liability. *Sykes v. City of St. Cloud,* 60 Minn. 442; *Phillips and Colby Const. Co. v. Seymour,* 91 U. S. 646, and *Barnes v. McLeod,* 114 Mich. 73, exemplify this doctrine.

The decision in this case of *Clark v. West* in no way conflicts with the rules governing the cases of *Hamer v. Sidway,* 124 N. Y. 538; or the two cases similar to it of *Lindell v. Rokes,* 60 Mo. 249, and *Talbott v. Stemmons,* 89 Ky. 222. For in *Hamer v. Sidway, supra,* an uncle had promised his nephew the sum of five thousand dollars if he should refrain from drinking liquor, using tobacco, swearing, and playing cards and billiards for money, until he should become twenty-one years of age. Upon the fulfillment of all conditions by the nephew, a suit was brought against his uncle's estate to recover the sum, and the court held recovery could be had as the abandonment of the legal right to use tobacco and occasionally drink liquor on faith of the promise of the uncle was sufficient consideration to support the contract, without inquiring as to whether there was a benefit to the promisor or a detriment to the promisee. In that case, the forbearance by the nephew of using tobacco and liquor for several years, was the consideration and the very substance of the contract, for it was upon the surrender of his legal rights that the entire contract was based; while in the case recently decided, the insertion of the clause requiring the plaintiff to abstain from liquor, was a mere incidental condition as to the method of the performance of the contract for writing books, which the defendant could waive at will.